Filed 2/24/05 P. v. Jimenez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROY DAMON JIMENEZ, Defendant and Appellant.	C043394 (Super. Ct. No. 00F04538)

A jury found defendant Roy Damon Jimenez guilty of the second degree murder of Cameron Jones and found true an allegation that he personally and intentionally discharged a firearm during the crime. The jury acquitted him of robbery and attempted robbery. The court sentenced him to state prison for 35 years to life.

On appeal, defendant contends the court erred: 1) in using visible shackles on him; 2) in admitting evidence of his possession of drugs and cash several days after the killing and in failing to give a limiting instruction as to this evidence; 3) in failing to instruct that one cannot be an accomplice to a murder when offering assistance after the crime is complete; 4) in failing to correct an instruction to identify target

offenses more specifically for liability as an aider/abettor; and 5) in discharging a juror with vacation plans. Finding no error, we shall affirm.

FACTS

The underlying facts are largely irrelevant to the issues on appeal. For our purposes, it is sufficient to note that according to the prosecution's evidence, defendant, who was himself an ecstasy dealer, agreed with Kelly Estep and Christine Ahart to rob the victim, Cameron Jones, of ecstasy Jones was dealing.[1] Jones was stabbed to death in his apartment during the incident. According to Ahart, defendant fired a shot at Jones after Jones had already been stabbed. Ahart claimed there was not enough time for her or the others to take anything from Jones's apartment before they fled.

Defendant denied any agreement to rob Jones, but admitted being at the scene of the stabbing (which he claimed Ahart committed) because he had gone with Ahart to Jones's apartment so she could pick up some clothes. Defendant admitted firing a gun in the direction of Jones after Jones had been stabbed, but claimed he had wrestled the gun from Jones during a struggle and claimed he fired the gun at Jones to scare him as they left, because Jones was on his feet and appeared capable of pursuing them.

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[1] Defendant was tried jointly with Estep before a separate jury. Ahart testified against defendant and Estep pursuant to a plea bargain.

When defendant was arrested, he had 95 pills of ecstasy and over $800 in cash. He claimed it was his own inventory, which he paid for with gambling winnings.

DISCUSSION

I

Use Of Visible Restraints On Defendant

Defendant contends the trial court erred in ordering *visible* restraints for both him and Estep.[2] We disagree.

At the outset of trial, the transporting officer requested a hearing on the need for restraints. As to defendant, she said, "[h]e always surprises us with what I would consider unprovoked attacks. [¶] He . . . takes advantage of the opportunities that present themselves; therefore, in a way I feel he's more of a danger [than Estep]. . . ." She also noted that "[m]ost of his attacks seem to be explosive . . . [without] exhibiting any type of behavior that would make us aware that a problem might occur and because of that I think it's very important that he remain in his belly chains in a security chair . . . ." She admitted that two incidents involved defendant's attack on members of a rival gang, but asserted he had gone out of his way to assault them.

In discussing alternatives, the court noted that skirting around the defense table would not shield the visibility of the requested restraints. Estep's attorney said he would favor a stun belt, but the court expressed qualms in light of recent case

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[2] As defendant does not appear to dispute the sufficiency of the *need* for restraints, we will not address that issue.

law. (E.g., *People v. Mar* (2002) 28 Cal.4th 1201, 1225-1227 [employment of stun belts requires more extensive showing than other restraints].) Defendant's attorney did not have any suggestions. The court ordered restraints in accordance with the deputy's recommendations; defendant's attorney then asked that defendant have both hands free, because the deputy had not made an issue of handcuffs in connection with him. The court stated it would check the record. As shown above, the deputy's testimony did not specifically include a request to handcuff defendant; however, the formal request was the same for both defendants. In its charge to the jury, the court included the mandatory cautionary instruction. (*People v. Duran* (1976) 16 Cal.3d 282, 291-292.)

A defendant cannot be physically restrained in the jury's presence absent a showing of a manifest need for the restraints. (*People v. Hill* (1998) 17 Cal.4th 800, 841.) The restraints must be as unobtrusive as possible while as effective as necessary. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217.) We review the trial court's decision to impose restraints for an abuse of discretion. (*Ibid.*)

Defendant's argument on appeal amounts to a request for us to substitute our judgment for that of the trial court. According to defendant, "visible shackles were not needed to keep both [defendants] in their chairs. There were knee restraints and other ways to keep the defendants seated, and there was no justification for visible restraints." Defendant does not provide any factual basis for countermanding the degree of

restraints the deputy recommended and does not point to any evidence in support of his supposition that the lesser restraints he suggests were either available or would have effectively dispelled the concerns that free hands present (such as the potential for a violent outburst against defense counsel after adverse events at trial). Defendant has failed to show an abuse of discretion.

II

Evidence Of Drugs And Cash

Before the testimony during the People's case about the ecstasy and cash found on defendant at the time of his arrest, defendant had repeatedly objected to the lack of probative value of this evidence (see 1 Witkin, Cal. Evidence (4th ed. 2000), Circumstantial Evidence, § 129, p. 479 [suggesting possession of generic item such as cash "has little tendency to prove theft"]) and the prejudice from admitting these other "bad acts" on his part. Ultimately, the trial court admitted the evidence as circumstantial evidence of defendant's guilt of robbery, finding its probative value (however slight) outweighed any prejudice. Defendant explained his possession of the drugs and cash in the course of his own testimony as being his own inventory and income.

During the settling of instructions, the court stated that it would be using a modified version of CALJIC No. 2.15 on the use of evidence of possession of recently stolen property, to which it would add a limitation that the jury could not use the evidence for any purpose other than drawing an inference of

guilt of robbery.[3] Since the evidence was not admitted as proof of any of the issues in Evidence Code section 1101, subdivision (b) (motive, intent, knowledge, etc.), the court said it did not intend to include a limiting instruction pertinent to that provision.[4] In closing argument, the prosecutor briefly suggested the evidence was proof defendant had robbed Jones.

On appeal, defendant contends the court should not have admitted the evidence. In the alternative, he contends the court should have given an additional limiting instruction that the evidence could not be considered as proof of his bad character or his disposition to commit crimes.

We do not find an abuse of discretion in the admission of the evidence. While its probative value may have been weak in light of Ahart's testimony about defendant's own dealings in ecstasy and the lack of opportunity to take anything from Jones's apartment (assuming there was ecstasy available to take), it was not entirely absent. Nor was there significant prejudice in light of the admission of defendant's prior conviction of possession of drugs for sale.

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[3] As read to the jury, the instruction provided, "If you find that a defendant was in conscious possession of recently stolen property . . . that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of robbery. . . . [T]here must be corroborating evidence . . . . [¶] . . . [¶] If you find that the defendant was in conscious possession of recently stolen property, you are not to consider this evidence for any other purpose than as stated in this instruction."

[4] Defendant's attorney noted the parties agreed in that regard.

As for an additional limiting instruction on use of the evidence, such an instruction would have been nothing more than the converse of the instruction the court gave to use the evidence *only* as circumstantial proof of robbery. Thus, it was incumbent on defense counsel to request the additional instruction. (*People v. Cleveland* (2004) 32 Cal.4th 704, 750.) Trial counsel was not ineffective for failing to request further instructions limiting use of the evidence since he could reasonably have believed such instructions would add nothing to the limiting instruction given.

III

Aider And Abettor Liability

Defendant raises two alleged instructional errors in connection with liability as an aider/abettor of an offense.

A

Completion Of Crime Instruction

If we credit defendant's testimony, Ahart stabbed Jones unexpectedly, and defendant fired at Jones only in an effort to aid in their escape. (We will ignore for now the medical testimony that his description of Jones standing on his feet and capable of further action borders on the inherently implausible.) He argues that the instructions on aider/abettor liability failed to make clear the principle that assistance offered after a crime is *complete* is insufficient either for conspiracy (*People v. Marks* (1988) 45 Cal.3d 1335, 1345) or for aiding and abetting (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164), because the court

did not instruct the jury that the murder was complete at the moment the perpetrator stabbed Jones.

Defendant does not provide any legal basis for such an instruction. Moreover, defendant is wrong. A crime is complete when all of its elements are satisfied. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 1164, fn. 7.) Thus, a murder ends when the victim *dies*. (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1395, 1397.) There is no basis for imposing an earlier boundary on aider/abettor liability if there is an interval between the stabbing and the victim's death. If an accomplice acts in any way to prevent a grievously injured victim from summoning aid, the accomplice can be liable for the murder.

Here, there was no evidence Jones was dead before defendant fired his shot. (Indeed, his own testimony was to the contrary.) The jury was not bound by his self-serving claim that he fired the gun only to prevent Jones from giving chase. It is an equally plausible inference that he fired the gun to frighten Jones from seeking rescue or to scare off any neighbors who might then be coming to the rescue. There was no error.

B

The Natural And Probable Consequences Instruction

A court must instruct a jury on the target crimes that a defendant intended to assist in order to guide the jury in its determination of whether the charged crime is a natural and probable consequence such that the defendant is vicariously liable for it. (*People v. Prettyman* (1996) 14 Cal.4th 248, 266-267.)

Here, the trial court instructed the jury that a defendant is guilty not only of intended target offenses but also "of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crime[] of murder . . . you must be satisfied beyond a reasonable doubt that: [¶] . . . [¶] [t]he crime of murder was a natural and probable consequence of the commission of the crimes of robbery and attempted robbery. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted . . . ."

Defendant states that the only possible target offense was robbery, and the jury declined to return a guilty verdict on that charge. He thus contends that the instruction's abstract plural reference to "crimes originally aided and abetted" and the direction that there was no need for unanimity in identifying the target offense invited jury speculation about unarticulated target offenses.

Defendant's criticism of the initial plural reference runs afoul of the principle that we interpret the instructions as would a reasonable juror, not a hypertechnical attorney. (*Boyde v. California* (1990) 494 U.S. 370, 380 [108 L.Ed.2d 316, 329].) It would be clear to any reasonable juror that the preamble to the instruction talks about the principle of natural and probable consequences in the abstract before the instruction then addresses the specific context of the present case.

Defendant's second premise founders on its speculative nature. If a reasonable juror did not believe a robbery or attempted robbery occurred, there would be no need to consider the applicability of the caveat regarding the permissibility of disagreement as to the target offense. Thus, if we accord significance to the jury's acquittal of defendant on the robbery charge, there is no reason to believe the jury convicted him of murder as a natural and probable consequence of robbery, rather than for assisting in the unpremeditated murder of Jones. Consequently, he cannot premise reversible error in this regard either. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

IV

Removal Of A Juror

The jury began its deliberations on a Tuesday afternoon and continued for the rest of the week. On the following Monday, the court and counsel met with Juror No. 7 in chambers, after which the court noted on the record that she had vacation plans beginning on Wednesday morning, but she had assured the court this would not influence her deliberations. The court also noted that it would revisit the issue on Tuesday afternoon if necessary.

By the afternoon, the jury had made several requests for the rereading of testimony and a further explanation of the concept of reasonable doubt. It had also come to the court's attention that jurors, particularly Juror No. 4, were concerned whether the court would be discussing their vacation plans. The court called the jury into the courtroom. It inquired about vacation plans.

Juror No. 4 stated that he was required to use six vacation days before the end of the month or lose them and had a vacation scheduled with his employer starting the following Monday. Juror No. 7 reminded the court about her earlier concerns. Juror No. 12 stated that her vacation had already started, but she had not planned anything. Juror No. 3 needed to be finished in time for her child's winter break in two weeks. The court dismissed the jury for the day.

On Tuesday afternoon, the court called the jury into the courtroom to discuss the presiding juror's report that the jury could not reach a unanimous verdict as to first degree murder because of disagreement as to intent to kill. The presiding juror also reported that the jury had taken a preliminary vote on count two of 12 unanimous votes (though a couple of jurors disagreed). The court directed the jury to retire and discuss count two. When it returned, the presiding juror again said there was an unspecified unanimous vote on count two, but the jury was not ready to return that verdict.

The court then questioned Juror No. 7 about her vacation plans. She was heading to Disneyland for four days with her family and would incur a rescheduling charge of $100 per person. The cost was not the concern, however, because her husband had already started his scheduled vacation. She could send someone in her place, but that was "just not an option we would like to take." After the court instructed the jury on methods for resolving their impasse on count one, the presiding juror again asked for clarification regarding the meaning of "intent to

kill." The court promised a response after consultation with counsel.[5] The jury retired for further deliberations.

Because Juror No. 7 "stated a preference to be with her family over the next four days" and the court did not want to suspend deliberations for the rest of the week (at which point Juror No. 4's vacation was scheduled to begin), the court decided to replace Juror No. 7 with an alternate. Apparently immune to the charms of the Magic Kingdom, defendant's attorney insisted that the court either delay the proceedings or compel Juror No. 7 to send someone in her place to Disneyland because she did not assert her categorical opposition to that option. The prosecutor noted that they had been aware of Juror No. 7's vacation for a long time and had assured her that the trial would not interfere. The court adhered to its plan, excusing Juror No. 7 when she returned to the courtroom. The court seated the alternate on Wednesday morning and directed the jury to begin their deliberations anew, for which reason (and with the concurrence of defendant's attorney) the court would not presently respond to the questions about intent to kill. After deliberating over the course of the next three days, the jury returned their verdicts on Friday afternoon.

Penal Code section 1089 provides in relevant part that "[i]f at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good

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[5] The court concluded it would simply reread existing instructions.

cause shown to the court is found unable to perform his or her duty . . . the court may order the juror to be discharged and draw the name of an alternate . . . .” “We review for abuse of discretion the trial court’s determination to discharge a juror and order an alternate to serve.” (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) However, “a juror’s inability to perform as a juror must ‘appear in the record as a demonstrable reality.’” (*People v. Johnson* (1993) 6 Cal.4th 1, 21.)

Defendant contends the record does not reflect as a demonstrable reality that Juror No. 7 was unable to perform her duties. We disagree.

A juror’s concern over the cancellation of a vacation is an adequate basis for a trial court to exercise its discretion to discharge the juror. (*People v. Lucas* (1995) 12 Cal.4th 415, 489.) Defendant contends Juror No. 7 did not display a demeanor of “concern and agitation” similar to the *Lucas* juror. This is a rather hard-hearted approach to a family vacation to Disneyland during the holiday season. It is clear the juror preferred to go with her family and until the last minute had been assured of participating. Even though she was not reduced to hysterics, as defendant would apparently require, the trial court was entitled to rely on the common reaction to a separation from one’s family for an anticipated activity. (Cf. *In re Mendes* (1979) 23 Cal.3d 847, 852 [court could reasonably conclude from fact of death of juror’s sibling that juror would be distracted without conducting hearing on the juror’s particular response].) “We review [a decision to discharge a juror] only for an abuse of discretion”

and "[w]e will not second-guess the trial court's discretionary decisions." (*People v. Bell* (1998) 61 Cal.App.4th 282, 288.) "An abuse of discretion occurs [only] where the court's decision exceeds the bounds of law or reason." (*Id.* at p. 287.) We find no abuse of discretion here.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

BUTZ, J.